IN THE

Supreme Court of the United States

W. E. RAKES, PLAINTIFF IN ERROR

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

MOTIONS.

FIRST.

TO ADVANCE THIS CAUSE.

Your petitioner, W. E. Rakes, respectfully represents:

1st. That he, plaintiff in error here in a proceedings to review a judgment of conviction under Sections 5508 and 5509 Revised Statutes entered by the United States District Court for the Western District of Virginia, whereby it was adjudged that he should serve FIFTEEN YEARS and one day in the Federal Penitentiary, and pay a fine of ONE HUNDRED DOLLARS.

2nd. That in May, 1908, this HONORABLE COURT, upon his motion upon proper showing as to his destitute condition, ordered that he be allowed to proceed *in forma pauperis.*

3rd. That he is represented in this Court by only one Attorney, namely, Waller R. Staples, who has

been by the General Assembly of Virginia elected as a member of its judiciary for the term commencing FEBRUARY FIRST, 1909, and who under the Constitution of that State is prohibited from engaging in the practice of the law either as to NEW or PENDING causes after said First Day of February, 1909.

4th. That he is advised that in due course his said cause would not be reached for argument before said FIRST day of FEBRUARY, 1909. and being wholly unable to employ and pay other counsel to become familiar with the voluminous record herein he would necessarily be deprived of the benefit of an argument of his said cause.

Wherefore your petitioner respectfully prays that his said cause be advanced on the Docket of this HONORABLE COURT so as to be reached for argument before the said FIRST day of FEBRUARY, 1909.

SECOND.

FOR BAIL.

Your petitioner would further respectfully represent:

That he is in bad health, that he has a family of 8 small children, the oldest being 15 years of age, the youngest 2 years of age. That his said family is destitute and dependent during his confinement solely upon the labors of themselves and their mother. That 6 members of his immediate family have within the last 6 years died from Tuberculoses, and that he believes that he has contracted, or is in great danger of contracting that dread disease. That he submits herewith the deposition of the Jail Physician, who is and has during his confinement been attending him, showing the condition of his health. That he believes that he can through the fidelity of a few friends, execute a bail bond in the sum of FIVE THOUSAND DOLLARS.

Wherefore your petitioner further prays:

That he may be admitted to bail pending the consideration by this HONORABLE COURT of his said WRIT of ERROR, and in the event of a judgment awarding a new trial herein, then that such bail be operative pending said new trial.

Respectfully submitted,

W. E. RAKES.

STATE OF VIRGINIA,
COUNTY OF FRANKLIN, } To-Wit:

I, Taylor Price, a Notary Public in and for the County and State aforesaid, do hereby certify that W. E. Rakes, whose name is signed to the foregoing petition, has this day personally appeared before me in my said County and made oath that the matters in said petition set up are true.

Given under my hand this 23rd day of November, 1908.

TAYLOR PRICE, N. P.

My commission expires Dec. 1, 1910.

Waller R Staples Attorney

In the Supreme Court of the United States

W. E. RAKES, PLAINTIFF IN ERROR
vs.
THE UNITED STATES.

The deposition of Dr. N. T. Greer, taken at the Office of the Clerk of the Circuit Court of Franklin County, Virginia, on the 20th day of November, 1908, at 11 a. m. by agreement between Thos. Lee Moore, United States Attorney for the Western District of Virginia, in behalf of the United States and Waller R. Staples, attorney for and on behalf of W. E. Rakes,

and which is to be exhibited on behalf of the plaintiff in error upon a motion for bail to be made in the above entitled cause and taken before T. W. Carper, a Commissioner in Chancery for the Circuit Court of Franklin County, Virginia, being an official of the State of Virginia, and authorized by law to take depositions with the same power and effect as a Notary Public.

Present, Hon. Waller R. Staples for Plaintiff in error.

Present, Hon. Thos. Lee Moore for Defendant in error.

N. T. Greer, a witness of lawful age, being first duly sworn says:

Question. I believe you have practiced medicine for 14 years, have been for 10 years jail physician for Franklin County, Virginia, and have been in attendance upon W. E. Rakes, the Plaintiff in error, for about 11 months during his confinement in said jail under an order of the Federal Court. Is that correct?

Answer. Yes, sir.

Question. How often have you visited him professionally during that period?

Answer. About once a week.

Question. From what troubles has he been suffering while under your care?

Answer. He has been suffering from bronchial trouble, chronic indigestion and nervousness; would hardly call it neuresthenia.

Question. Have you any reason to suspect that he has contracted tuberculosis?

Answer. I have thought once or twice that it was possible that he might have it, but have never diagnosed it as tuberculosis, his sputa has never been examined and it is almost impossible to determine in the early stages whether it is or not without an examination of the sputa.

Question. What effect in your opinion would confinement in jail have upon these troubles?

Answer. I think it would necessarily aggravate the chronic indigestion and nervousness.

Question. How as to bronchial troubles?

Answer. I think it operates to hinder a recovery from the bronchial trouble.

Question. What would you say will be the probable effect of a further continued confinement upon his health?

Answer. It would be probably detrimental to his health but I couldn't say to what extent. It would certainly be to some extent.

Question. What would be the effect of such confinement if he had tuberculosis?

Answer. It would be detrimental to him. Upon a positive diagnosis of tuberculosis it would be disastrous.

Question. Is his physical condition better or worse than when you first visited him?

Answer. I think it is worse.

Question. If you were at liberty to prescribe treatment and conduct for him with a view to preserving his health or restoring the same what would you prescribe?

Answer. I wouldn't prescribe confinement in the County Jail but would prescribe open air and exercise.

CROSS EXAMINED.

Question. To what extent as nearly as you can say has the confinement of this prisoner been detrimental to his health?

Answer. I don't know whether I can say to what extent; it has been detrimental to a certain extent but I can't say to what extent, he is more emaciated and he suffers more from indigestion. This is natural as the result of his confinement and would be so with nearly all cases of confinement where the prisoner is so affected.

Question. Would or not his confinement in jail

for several months as testified to by you have the effect of making him nervous or aggrevating his indigestion?

Answer. I think it would to a certain extent.

Question. Might not his ten months of confinement in jail have naturally resulted in the indigestion and nervous trouble to which you have referred?

Answer. It is possible that it is the cause of it.

Question. In so far as the nervous trouble and indigestion to which you have referred is concerned is the effect of such confinement any worse upon this prisoner than upon the average prisoners you have been called to attend during your ten years' experience as Jail physician?

Answer. Well I think it is; a great many prisoners are not affected at all by confinement.

Question. What is your best opinion from his present physical condition considering all ailments of which you have knowledge from which the prisoner may be suffering as to whether or not a few weeks or a few months further confinement of this prisoner would result fatally?

Answer. I couldn't say that I think it would result fatally but might injure his health to a certain extent but I couldn't say to what extent.

Question. From your observation of him during the last ten months confinement, having visited him about once a week according to your recollection, are you now able to say that he has decided or pronounced symptoms of tuberculosis?

Answer. I have seen some symptoms along but have not seen anything that would warrant me in making a diagnosis for tuberculosis.

And further this deponent sayeth not.

Virginia, Franklin County, to-wit:

The foregoing depositions of Dr. N. T. Greer were taken, subscribed and sworn to before me, T. W. Carper, Commissioner in Chancery of the Circuit

Court of Franklin County at the time and place mentioned in the caption above.

Given under my hand this the 20th day of November, 1908.

.....

Comm'r in Chan'y Franklin Cir. Court, Va.

The original of the foregoing papers, all duly certified have been filed with the clerk of this court.

IN THE

Supreme Court of the United States

W. E. RAKES
v.
UNITED STATES

Upon a Writ of Error to the District Court of the United States for the Western District of Virginia.

MOTION.

The plaintiff in error, under the terms and provisions of Section 878 of the Revised Statutes, moves the Court for an order directing the printing of the record herein and the payment therefor out of the Treasury of the United States, as well as for the payment out of said Treasury of the proper fees of the Clerk of the District Court for copying and certifying said record.

In the case of the United States v. Richard Jones, 193 U. S., p. 528, the Court, speaking through the Honorable the Chief Justice, said (on page 530):

> "The indigent defendant ought not to be deprived of availing himself of his writ of error because of his poverty, and when the Court has ordered the transcript in the interests of justice, the Clerk ought not to be deprived of compensation."

Counsel for plaintiff in error tenders to the Court the petition of said plaintiff in error duly verified.

Respectfully submitted,

WALLER R. STAPLES,
Counsel for Plaintiff in Error.

PETITION.

To the Honorables, the Judges of the Supreme Court of the United States:

Your petitioner, W. E. Rakes, would respectfully show unto your Honors:

1st. That he has been tried in the District Court of the United States for the Western District of Virginia, at the September (1907) term thereof, upon a charge of conspiracy and murder, found guilty, and a judgment of conviction entered therein.

2d. That a writ of error to the Supreme Court of the United States was awarded to your petitioner by the honorable Judge of said District Court.

3d. That the record in said cause has been returned to this Court pursuant to said writ of error, and that the same is docketed herein as No. 582 of the October (1907) term.

4th. That your petitioner is in dire poverty, wholly without means of any kind; is destitute of property, real or personal; is confined in jail pending the prosecution of his said writ of error, and is wholly and totally unable to pay to the Clerk of said District Court his fees for copying and certifying the record in said cause, or for the printing of said record now lodged in this Court.

Wherefore, your petitioner respectfully prays that under the laws and statutes of the United States said fees and costs may, by this honorable Court, be ordered to be paid out of the Treasury of the United States.

And as in duty bound, your petitioner will ever pray.

W. E. RAKES,
Petitioner.

STATE OF VIRGINIA,
COUNTY OF FRANKLIN, } To wit:

This day personally appeared before me, W. E. Rakes, a Deputy Clerk in and for the county and State aforesaid, in my said county, W. E. Rakes, who being by me first duly sworn, stated upon oath that he is the petitioner named in the foregoing paper, and that the things therein stated are true.

Given under my hand this 27th day of April, 1908.

T. W. CARPER,
Deputy Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

W. E. RAKES, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 257.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

MEMORANDUM OF THE UNITED STATES ON MOTIONS TO ADVANCE AND TO ADMIT TO BAIL.

The court has permitted the plaintiff in error to proceed *in forma pauperis*. He now moves to advance on the ground that his counsel, having been elected to the judiciary of the State of Virginia, will not be able to argue the cause after February 1, 1909. The Government neither consents nor opposes this motion, but submits the matter altogether to the court.

As to the motion that the plaintiff in error be admitted to bail, the testimony of the jail physician is substantially that Rakes's general condition shows the effect of the lack of open air and exercise naturally due to his confinement in jail, but that this

is the extent of the injury to his health, and that nothing warrants a diagnosis for tuberculosis. Under these circumstances I submit that there is no hardship in his continued confinement, especially if his case is advanced for hearing, as he now requests. It must be remembered that he was convicted and sentenced on charges of conspiracy and murder actually committed under sections 5508, 5509, Revised Statutes.

HENRY M. HOYT,
Solicitor-General.

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In the Supreme Court of the United States

W. E. RAKES, PLAINTIFF IN ERROR

vs.

THE UNITED STATES.

OCTOBER TERM, 1908.

NO. 257.

Opening Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This is a writ of error to a judgment of the United States District Court Western District of Virginia, by which plaintiff in error, W. E. Rakes, was sentenced to the penitentiary for fifteen years and one day, and fined $100.00 for an alleged violation of Section 5508 and 5509 Revised Statutes.

On the night of March 24, 1907, about 2:00 a. m. Ann Hall was killed in her home in Patrick county, in the Western District of Virginia, by a wound from several small bird shot, supposedly fired from without said building.

It appears from her surviving sister, Jane Hall, that these two aged women were aroused by the barking of a dog, followed by the firing of a gun. Jane Hall arose, went to the door and was confronted by

five armed men, who she claims to have identified as W. E. Rakes, (plaintiff in error) Grover Beamer, Peach Rakes, George Booth, and George Martin. To quote her testimony (Record p. 108).

"They divided and went round the house. I opened the door, and left the door open. We started to the fire and she (Ann Hall) said 'My arm is ruined.' Then she fell to the floor, and the next word she said, 'I am done, I am done.' After they quit shooting Grover Beamer busted the door open and came in the house. They first came to the door; Will, and the bunch of men came to the open door. I knowed Will just as soon as he came to the door."

On March 25th, a Coroner's inquest determined that Ann Hall was murdered and that the plaintiff in error and Grover Beamer were accessories to said murder.

On March 26th, plaintiff in error executed before a Justice of the Peace for said county his recognizance to appear on the first day of the May, 1907, term of the Circuit Court of Patrick county, to answer any indictment found against him. He appeared on the first day of said term, surrendered himself, was indicted for the murder of Ann Hall and admitted to bail by said State Court, to appear to answer said indictment at the first day of the next (August, 1907) term. He was shortly thereafter arrested by a Federal officer upon a warrant charging illicit distilling, and later upon a capias, issued pursuant to an indictment, in effect the same as that herein, found by a Grand Jury of the United States District Court for the Western District of Virginia.

He continued in the lawful custody of the State of Virginia by reason of the pendency of his bail but in detention by the United States until the 13th day of September, 1907, when in custody of the Marshall for said District, he was carried to the then sitting Lynchburg, Virginia, term of said District Court upon which date the indictment herein of record, was returned

against the plaintiff in error, together with Grover Beamer, Peach Rakes, George Booth, and George Martin. When this indictment was returned the plaintiff in error being set to the bar of the Court; the August term of the Circuit Court for the county of Patrick, to which his bond required his appearance, still being in term, he, in his own proper person, tendered to said United States Court his special plea duly verified setting up these facts, alleging that the State Court had first acquired jurisdiction of his person to answer the charge of said murder, and praying that said Federal Court should no further proceed with his trial until the indictment then pending in the State Court, was disposed of.

The United States demurred to the plea, which demurrer was overruled, and the order overruling the demurrer then entered. The United States then tendered its special replication to said plea, but the defendant objected to the filing thereof, asking for judgment upon said plea after demurrer overruled. The Court refusing, said judgment permitted the United States, over the defendant's objection, to with-draw its demurrer after joinder therein and judgment over-ruling the same.

Thereupon the United States taking issue neither upon the facts in the said plea set up, the form or manner of their allegations, or the legal sufficiency thereof, was permitted to file its special replication to said plea which the defendant moved to reject for reasons stated in writing (p. 6 record) in substance because it neither traversed or avoided the facts set up in said plea, but this motion was over-ruled. The said replication (Record p. 12) is epitomized to the effect that the Commonwealth's Attorney for Patrick county, Virginia, had, upon the happening of this tragedy, communicated with the United States District Attorney, and had continuously thereafter been in co-operation with the Federal Authorities in searching out the evidence against the parties indicted; that the State

Authorities had made no preparation for trial; that the Commonwealth of Virginia had not appeared at the Bar of the United States District Court seeking the custody of the defendant; that the defendant while in the physical detention of the United States Marshall had not appeared at the Bar of the State Court demanding trial; that the "officials of Patrick county" BELIEVED that the jurisdiction of the State Court had been relinquished; that the United States had prepared for trial AT GREAT EXPENSE, and that the State of Virginia had issued no process for the purpose of taking the defendant from the custody of the United States Marshall.

The defendant thereupon seeking to meet any matter in said special replication which might relate to said plea in its possible legal effect, tendered his special rejoinder in writing, setting up among other things (Record p. 14) that his bail bond in said State Court was in full force and effect, but this paper was rejected and defendant was compelled to join issue on said special replication, and hearing was by consent had before the Court without a jury upon the issue so joined.

The evidence adduced (Bill of Exceptions No. 1, Record p. 21) is in substance that the allegations of the plea were correct, the bond was still in force, the August, 1907, term of the State Court, although not actually sitting, was still in term unadjourned, that the statements in the special replication contained were practically true, except that the Commonwealth's Attorney of Patrick county, called by the Court as a witness on said issue, testified that the question of jurisdiction had never been discussed between himself and the United States Attorney, nor had he requested that the United States take jurisdiction of the case. Upon being asked by the Court whether he, as Commonwealth's Attorney for the State Court, desired to move for custody of the defendant, he declined to answer until he had conferred with the Judge of the State

Court, whereupon this hearing was adjourned from Saturday until Tuesday, in which time the witness left the stand, traveled into the county of Franklin, had an interview with the Judge of the Circuit Court of Patrick county, while said Judge was in another (to-wit Franklin) county, ascertained the *individual* views of said Judge, came back, resumed the stand and declined to move for the custody of the defendant.

In the course of this hearing numerous exceptions were taken to the admission by the Court of evidence thought to be irrelevant to this issue. These will be later discussed at length. The Court having intimated its conclusion upon both questions of law and fact upon the issue, the defendant requested the Court first to find whether the United States or the defendant had maintained the issue, which issue the Court adjudged had been maintained by the United States, whereupon the defendant moved for a judgment on said plea *non obstante*, but the Court entered judgment thereon for the United States.

This prosecution is predicted upon Sections 5508 and 5509 of the Revised Statutes.

Section 5508 provides *inter alia*, that if two or more persons shall conspire together to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, they shall be punished as therein provided. This section further provides for the punishment of any two or more persons who shall go in disguise upon a public highway, or upon the premises of another with intent to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of the rights or privileges aforesaid.

Section 5509 provides that if in the act of violating any of the provisions of either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same,

with such punishment as is attached to such felony or misdemeanor by the laws of the State in which such offense is committed.

It is the theory of the prosecution that in December, 1906, one Peter Hall, a citizen of the county of Patrick, Virginia, gave information to a United States Deputy Marshall to the effect that the plaintiff in error was engaged in the illegal operation of a distillery. That in February, 1907, the said Peter Hall gave to a United States Deputy Marshall information to the effect that Grover Beamer, one of the co-defendants, was engaged in the illegal operation of a distillery. That the plaintiff in error was arrested upon the information so given, a preliminary examination was had, and he was discharged because there was not sufficient evidence to justify sending him on to the grand jury. That Grover Beamer was never arrested upon the information given by Peter Hall nor any warrant sworn out for his arrest for said illegal operation. That the plaintiff in error and three of the remaining co-defendants, but not Grover Beamer, met together on Sunday, March 24th, at a distillery near the residence of Peach Rakes, one of the co-defendants, and there formed a conspiracy to oppress, threaten, and intimidate Peter Hall, because of his having made the two reports aforesaid.

That the alleged conspirators remained there several hours, yet talked privately together not over five minutes of that time, separated early in the afternoon of that day, and that three of them, to-wit, plaintiff in error Beamer and Peach Rakes, were next seen together with one Charlie Turner at the residence of Elizabeth Hall, an Aunt of Peter Hall, about eight o'clock p. m. of Sunday, March 24th, and were then in search of Peter Hall. That not finding him, they, except Charlie Turner, continued together and were joined by defendants, Booth and Martin, and these were next seen at the residence of Ann Hall, about two a. m. of the same night, where they appeared and

demanded to see Peter Hall. That they appeared at the North door of the residence, and the door being opened by Jane Hall, the party separated, passing around either end of the building, and immediately seven shots were fired, one of them through a window, one or two of them through a three-quarter inch poplar door, and the remainder were fired into the outside wall of the house. That the shots fired were all small bird shot, between No. 4 and No. 6; that loaded cartridges were found in the yard upon the ground near some empty shells, and that these former contained bird shot; that they were fired from two guns known as 12 and 16 guage shot guns, and that several of these shots took effect in the person of Ann Hall, one of them cutting an artery, causing her death within about ten minutes.

That the motive actuating the conspiracy was an ill will against Peter Hall, because of his having given the information aforesaid. That having agreed together to threaten and intimidate Peter Hall, they were each guilty of a violation of the provision of section 5508, and that while upon their mission with the purpose to threaten and intimidate Peter Hall for the reason aforesaid, and in an attempt to kill the said Peter Hall, Ann Hall having been killed, the defendants were each of them guilty of the murder of Ann Hall as the result of an attempt to murder Peter Hall, and that the offense comes within the scope of Federal authority, by reason of the original occasion of their ill feelings against Peter Hall. In other words, that because in the formation of the conspiracy the defendants having violated the provisions of Section 5508 the Federal Government thereupon immediately assumed a police control of all and several the acts and doings of each and every one of them until the object of the conspiracy had been consummated, or the conspiracy itself had been abandoned. That if two persons conspire together in violation of the Federal law, there will be given to the Federal Government a jurisdiction over their persons

and all their conduct during the whole life of the conspiracy.

That the Federal Government having thus by the act of the parties, been placed in guardianship of their conduct, it then transpired that the whole course of that conduct constituted one continuous and uninterrupted violation of the Federal Law, which might be the subject of one general indictment, but to which might be attached as many separate and distinct punishments as there were overt acts done during this period of Federal guardianship and to be measured by the sum of the punishments which the laws of the State of Virginia accorded to the several acts which might be attempted or consummated during that period of Federal supervision.

Hence the United States grand jury returned an indictment which charged in effect as follows: That on the ——— day of March, 1907, William E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and others unknown, conspired to injure, oppress, threaten, and intimidate Peter Hall in the free exercise of his Federal right, to-wit, of giving information to the officers of the United States of violations of the Internal Revenue Law by W. E. Rakes, Grover Beamer, and others; that the said Peter Hall had reported the said Rakes and Beamer to the United States officials for the violation of the Revenue Laws, and that while "in the act of so combining, conspiring, and agreeing together and amongst themselves as aforesaid, and for the purposes aforesaid, did with intent to threaten, BEAT, injure, KILL and intimidate Peter Hall, and in the furtherance of such attempt, and in attempting to execute the said conspiracy," kill Ann Hall.

That the said defendants did commit the crime of conspiracy and also the crime of murder under the laws of Virginia, concluding against the Statute and the peace and dignity of the United States.

The second count of the indictment is a replica of the first count, only somewhat amplified.

It will be noted that the United States has charged in *each* count of one indictment a violation of the provisions of both sections 5508 and 5509, and have thus proceeded upon the theory that the crime of the conspiracy constitutes the body of the offense, and gives jurisdiction to the Federal Court, and that the act of murder charged in the indictment is treated as an overt act pursuant to the conspiracy not otherwise cognizable by the Federal Court, and not punishable by the Federal Court as such, but only punishable as a part of the conspiracy, the measure of this part of the punishment to be determined by reference to the State Law.

It is also assumed by the form of the indictment that any other felony, or misdemeanor which may be in violation of the State Law committed during the life of the conspiracy, becomes a part of the conspiracy whether the INTENT with which that act was done, was or was not the intent, motive or purpose which actuated and gave Federal Jurisdiction over the conspiracy itself.

To this indictment defendant demurred, upon grounds which are in substance as follows:

Because the conspiracy was not charged with sufficient certainty, or so as to constitute an offense under the Federal Law; because the assault upon, and murder of Ann Hall was not so charged as to bring it within the proper scope of a Constitutional Federal Statute, but was so charged as to make the indictment bad for duplicity.

The demurrer was overruled, and the defendant plead not guilty and the trial was begun. Much testimony was admitted at the instance of the Government over the objection of the defendant, only small parts of which are assigned as error, because of what counsel for plaintiff in error take to be the conclusive character of

those rulings which have been selected for such assignments.

Those selected are to the effect that a witness was permitted to state that there was not a branch on the large farm of C. P. Nolan, a brother-in-law of the plaintiff in error, upon which an illicit distillery had not been run. That a witness was allowed to state a conversation upon the streets of Lynchburg between himself and one Bill Turner, who is not charged to have been involved in this offense, and which was interpretated by the Government as an intimidation by the said Bill Turner to prevent said witness from testifying freely for the Government, and in permitting the same witness to detail an alleged conversation with the plaintiff in error without having designated the time or place thereof. (Bill of Exceptions No. 3, Record p. 170).

It is further assigned as error that the Court permitted the Government to offer in evidence a certain shot gun, which was in no wise identified or sought to be identified as ever having belonged to, or been in the possession of either of the parties charged in this indictment.

It being the theory of the Government that the alleged conspiracy was conceived because of the fact that Peter Hall was an informer, the defendant sought to show that whoever committed the offense charged, were more probably actuated by the general bad character of the said Peter Hall, than by his practice and occupation as an informer; that the said Peter Hall was a reckless and dangerous character, a petit thief, and a man from whom the neighbors generally had to protect their families, their homes, and their farms by guards posted during their absence from home.

The Court excluded all such evidence, but offered to permit the defendant to show that he or either of his co-defendants *were actuated by* such other motive.

At the conclusion of the evidence for the Government, defendant moved to exclude the same from the

jury upon the ground that there was not sufficient evidence to make out a *prima facia* case of such a conspiracy as was prohibited by the Federal Statute, but the Court overruled this motion; thereupon defendant offered to prove his whereabouts at the time of the alleged killing, by the testimony of his wife, but the Court ruled that she was incompetent as a witness.

The defendant then offered eight citizens of high standing, four of whom were Government witnesses, among them a minister of the Gospel, and two officials of the county of Patrick, who testified with unanimity that neither of the three prosecuting witnesses, to-wit, Jane Hall, Peter Hall, or Ben Hall, could be believed upon oath in a matter in which they had any prejudice or interest, the prejudice of each of these witnesses against the plaintiff in error and two of his co-defendants having been brought out by cross-examination.

At the conclusion of all the testimony, defendant renewed his motion to exclude all the evidence, which was overruled, and he then tendered to the Court in writing seventeen several instructions (Record pp. 174-178) which in part expressed his view of the proper law of the case, and which in part expressed his contention of his right to a modification of the views of the Court upon the questions of law which had from time to time been expressed by its rulings during the trial. All of these instructions were refused, and in lieu thereof the Court read from a written charge to the jury (Record p. 178) each part and parcel of which had been in chambers discussed with the Court and Government counsel by counsel for the defendant and their objections thereto pointed out at length.

After the case had been argued by counsel, the jury retired and returned its verdict, which was as follows:

"We, the jury find the within named defendant, W. E. Rakes, guilty of conspiring as charged, and also guilty of murder in the second degree, and we fix his punishment for said last mentioned offense at im-

prisonment in the penitentiary for fifteen years." (Record p. 19).

Upon this verdict the defendant moved the Court in arrest of judgment and subsequently for a new trial upon grounds assigned at the time, (Record pp. 173-174) which the Court overruled, and entered judgment, that the plaintiff in error be imprisoned in the Penitentiary for fifteen years and one day, and pay a fine of $100.00, which judgment the defendant moved the Court to set aside upon the ground that it had imposed a double punishment; that the punishment was in excess of the verdict of the jury, and was unlawful and unconstitutional. But the Court overruled the motion and the judgment so entered is the judgment here complained of.

Conceiving that the Court had improperly adjudged that it had jurisdiction of the defendant; that in ruling upon the demurrer it had given a construction to the Statutes beyond the constitutional power of Congress to enact, and that in the form of the verdict, and by the judgment of the Court the plaintiff in error had been subjected to a double jeopardy, and a double punishment for one alleged offense, plaintiff in error under the provisions of the Act of Congress defining the Appellate Jurisdiction of the Supreme Court of the United States in criminal cases, sued out his writ of error to this Honorable Court and respectfully submits herewith his reasons and the authority for the various assignments of error set forth in the record.

ERRORS COMPLAINED OF.

The errors complained of may be divided according to the seven several stages of the case, as follows:

1st.—The Defendant's Special Plea,

2nd.—The Demurrer to the Indictment.

3rd.—The Admission and Exclusion of Evidence.

4th.—The Sufficiency of the Evidence to Support a Verdict.

5th.—The Instruction.
6th.—The Form of the Verdict.
7th.—The Judgment.

FIRST.

THE DEFENDANT'S SPECIAL PLEA.

The first five and the seventh and eighth assignments of error (Record pp. 187-8) relate to the rulings of the Court in respect to this plea, and are in substance as follows:

1st. In not excluding the replication for the reason that it set up no matter relevant or proper in response to said plea

2nd. In permitting the Government to withdraw its demurrer after issue thereon joined and demurrer overruled.

3rd. In not striking out said replication because (a) that there is nothing therein showing any reason why judgment should be withheld from defendant; (b) that said replication was wholly argumentative; (c) that it was error to permit the filing of said replication.

4th. In striking out the special rejoinder because the same was a proper defense, and answer to the matters set up in the replication.

5th. In not entering judgment for the defendant upon the said plea, notwithstanding the conclusions of the Court as to the facts.

7th. In entering judgment for the Government on the said special plea, and in not entering judgment for the defendant thereon.

8th. In overruling the several motions of the defendant to exclude from the records and its consideration the evidence of the various witnesses adduced on the trial of the special plea, as set up in the defendant's bill of exceptions No. 1.

This plea had set up that the Circuit Court of Patrick county, Virginia, had first acquired jurisdiction

over the person of this defendant. The United States demurred, and the demurrer was overruled. The United States then tendered its special replication but the defendant moved for judgment on the plea because demurrer overruled, but the Court refused to enter this judgment and allowed the United States to withdraw its demurrer and to file its replication.

The parties had gone to trial upon the issue joined upon the demurrer and the judgment had been pronounced. In the language of Judge Marshall in Mandyville v. Wilson 5 Cranch 18.

"After the parties have gone to trial upon set of pleadings and judgment has been pronounced, it is doubtful whether the Court can permit the demurrer to be withdrawn."

The demurrer having been withdrawn, the United States filed its special replication setting up in substance that the prosecuting officers for the State and the United States had co-operated in working up the evidence that the State had made no preparation for trial; that the State had not demanded the custody of the defendant, and that the defendant had not demanded a trial in the State Court, and further that the officials of Patrick county believed that the jurisdiction had been relinquished, and that the United States had prepared for trial at great expense.

It is respectfully submitted that neither of the facts alleged has the legal effect of avoiding the plea. As to the dealings and understanding between the two prosecuting officers, the defendant of course knew nothing. But even if it could have any legal effect whatever, the record shows that the States' officer had not so considered it, for after this alleged co-operation, he set the machinery of the State on motion, indicted, arrested, and detained the defendant in the State Court. This official act was the best and only proper evidence of his legal purpose.

The failure of the State authorities to make preparation for trial was irrelevant, as it was no legal evi-

dence of the intention of the State Court to relinquish its jurisdiction. The preparation is the act of a party litigant, and not the act of the Court. That the State had not demanded the custody of the defendant, was no answer to the plea, because the State Court had a right to rely upon the presumption that the Federal Court, when the former jurisdiction of the State Court was brought to its attention, would, pursuant to the time honored rule, refuse to proceed further in the premises. That the defendant had not demanded a trial in the State Court, was no answer because he had been in the physical detention of the United States Marshall. The opinion or belief of the officials of Patrick county that the State Court had relinquished its jurisdiction, is too irrelevant to discuss, as is the item of expense at which the Federal Government had prepared for trial.

Therefore this replication in no wise operated to avoid the plea.

The defendant having been compelled to join issue upon the replication, and the matters of law and fact having been submitted to the Court, the Court admitted evidence of the most irrelevant and informal character.

Aside from the Government's effort to show the facts set up in the replication, it undertook to show that the State Government was willing to relinquish its jurisdiction. This was in no wise within the scope of the replication, nor was leave asked to amend the pleadings to conform to the evidence adduced.

In a civil action under the Common Law upon a plea of former action pending, the issue must be tried upon the status of the case at the time of the filing of the plea. A dismissal of the former action after the filing of the plea, is of no avail.

"The plaintiff can not after a plea in abatement of the pendency of a prior suit, avoid the effect of a plea by discontinuing the first action which was pending at the time of the plea." Chitty's Pleadings, 13 Am.

Ed. Vol. 1, 454. Frogg's Exr. v. Long's Admr. 3 Dana 157. 28 Am. Dec. 69.

There have been some departures from this rule by the State Courts and under various statutes, but the rule obtaining in the Federal Courts is the rule under the Common Law as it existed in 1789.

"But no law of a State made since 1789 can effect the mode of proceding or the rules of evidence in criminal cases." United States v. Reed 12 Howard 356.

On such issue the fact of such dismissal can be tried only by the record of the State Court. I Cyc. 25, Note 28. Citing Evans v. Johnson 115 Cal. 180 46 Pacific 906.

If this is the true rule in a Civil case, it must be the more so in a criminal action.

It is settled beyond dispute that where proceedings respecting a specific subject matter of jurisdiction are instituted in two Courts, that Court which first acquires jurisdiction by the execution of its process upon the *res* in a Civil action or upon the person of the defendant in a criminal case, must first exhaust its function before the other Court can proceed. Taylor v. Taintor, 16 Wallace 366. Nor is the rule affected by the fact that the person under arrest is out on bail. Ib. The defendant continues in the custody of the Court whose process is first served, although he may be out on bail.

Even had the replication contained the allegation that the State of Virginia was willing to release its jurisdiction, it is submitted:

1st. That under the rule laid down by Mr. Chitty, this could be shown only by the action of the State Court taken before the time of the filing of the plea.

2nd. That whatever action the State Court might see fit to take could be evidenced only by its record, and

3rd. That there is no evidence whatever that the State Court undertook at any time to relinquish its jurisdiction. In the language of the learned trial Judge

(Record p. 42) such action by the State Court "can be legally shown only by the order of such Court."

No such record is offered in evidence. The record does show that no such dismissal was attempted. That the case was continued. When the State Court entered the order of continuance, it is conclusively presumed to have known of its jurisdiction over the person of the defendant, and that this jurisdiction could be released only by its order. The failure to enter the order is conclusive evidence of its retention of that jurisdiction. The State prosecutor when called upon to indicate whether or not he desired to make a motion for the custody of the defendant, said (Record p. 43) "I have not been called upon to waive any jurisdiction, but to make, or decline to make a motion to remand."

In *re* James 18 Fed. 853, the defendant was on bail for an offense cognizable only by the State Court. Proceedings to remove the defendant into another State were instituted in the Federal Court predicated upon an offense cognizable by the Federal Court of the State into which the defendant was sought to be removed. The defendant having been admitted to bail in the State Court, his bondsmen appeared in the Federal Court, objected to the removal and requested his release from detention by the United States. The Court held that the bondsmen were without interest in the premises, but that since the facts had been presented to the Court, even though this presentation was by parties without interest, and outside of the record, yet the defendant would be released. Holding in Syl. 4.

"The failure of the State to appear by its judicial officers to object to proceedings to remove a prisoner from the jurisdiction of its Court can make no difference where the right of the State fully appears and has been made known to the Court."

In the case at bar the prosecuting officer says: "I have not been called upon to waive any jurisdiction." Yet he asked leave to visit the Judge of the Circuit Court of Patrick county and obtain his views, which

leave was granted. The prosecuting officer was the representative of one of the parties litigant in the State Court.

In Virginia the Attorney for the Commonwealth has not the right which is accorded to such officers in many States to *nole prosequi* a case without consent of Court.

"The general Court (in Virginia then the Court of last resort in criminal cases) consisting of five Judges at the Fall term of 1803, unanimously decided "that the District Court Attorney has not a right to enter a *nole prosequi* in any case without the consent of the Court first had." First Virginia cases 139.

If it is granted that one party to this litigation had the right to set up the prior jurisdiction of the State Court, surely the other party had the same right. If neither party had the right, the Court should of its own motion recognize the same when brought to its attention, and should look only to the judicial action of the State Court to ascertain the purpose of the State Court.

In criminal cases the sovereignty of the State appears in two separate capacities:

1st.—In its juridicial function.

2nd.—As a party litigant.

In its first, standing as impartial between the defendant and itself in its second capactity as between A. and B. upon a Civil issue.

It is as shocking, not only to the judicial conscience, but to the common sense of right and fair dealing, that in its first capacity it should pervert its juridicial function out of consideration for the exigencies surrounding it in its second capacity, as that a Judge should try his own cause. Otherwise its judgment would be of expediency, and not of principle The individual Judge is presumed to be incapable of entirely separating interest from action, but the Sovereign State is accorded a higher attribute, and should be the more careful of its vindication.

Now, the right of the State to prosecute its indict ment is one thing, and the judicial control over the prisoner at the bar, standing in response to that indictment, is another.

Its interest *coad* the one is vested in its public prosecutor, *coad* the other in its Court in term. A private conference between that officer and the individual, who when upon the bench is Judge of that Court, but when off the bench is but a citizen, is as ineffectual to alter the legal status of a case as would be the private wished of the prisoner at the bar.

"Judicial acts can only be performed in term and by the Judge while presiding in the Court and exercising the judicial functions of the Court * * * * a Judge has no judicial power outside of the Court in which he officiates, or in other words, a Judge as an individual has no power to hear and determine any matter involving the exercise of judicial power." U. S. Life Ins. Co. Shattuck 43 N. E. 390-391.

"The Judge of a superior Court has no power to make at chambers in a county other than that where the issue is pending, any order, etc." Syl. 5 State v. Parsons 20 S. E. 512.

Yet the learned trial Judge forced this defendant to an issue predicated upon the manner in which the public prosecutor conducted his case, and upon a claim of fair dealing as between prosecuting officers of the two Governments concerning their priority of right to bring trial. Instead of asking for such order, the learned Judge of the District Court permitted the State's prosecutor to sound the individual inclination of the State Judge while he was off his bench, and then to determine his own course of conduct, (which was but the expression of the contention of one of the parties litigating in the State Court).

As was said above, this inquiry was beyond the scope of pleading, but if it were justified by the pleadings, it merely presents the situation as being one where two parties to the proceedings in the State

Court the stand in Federal Court, the one claiming the prior jurisdiction of the State Court, the other *merely refusing* to rely upon or to assert it. If the one party had no right to invoke this prior jurisdiction, the other party had no right to release it.

There was before the trial Court no proper evidence of any action or inaction by the State Court. The evidence adduced, if admissable upon any ground whatever, indicates only an unwillingness on the part of the State's prosecutor to demand the rights of the State and an unjudicial acquiescence (proven by hearsay) on the part of the individual who held the State's Commission as Judge of that Court.

Therefore, it is submitted that the District Court erred in failing to enter judgment for the defendant upon his special plea and in the several rulings leading thereto as hereinbefore set out.

SECOND.

THE DEMURRER TO THE INDICTMENT.

The sixth assignment of error (Record pp. 187-8) relates to the action of the Court upon the demurrer.

This had raised in the argument before the trial Court the question upon which the validity of its final judgment ultimately came to rest.

As before stated herein, it was the theory of the prosecution that the defendants conspired to threaten, oppress, injure and intimidate Peter Hall because of his having exercised "A Federal Right." That in executing this conspiracy Ann Hall was killed by some one of the conspirators, which one being unknown. That the conspirators were therefore each of them guilty of the murder of Ann Hall, and amenable therefor to the Federal Government because the object or purpose of the conspiracy came within the prohibition of 5508 Revised Statutes and the resulting murder was an incident to the acts violating the provision of that Section.

Looking at the case then in this light, we ask two questions:

First, What act is sought to be punished? and

Second, By what authority can that effort be consummated?

To the first question we find three several responses.

A. The conspiracy alone.

B. The murder alone.

C. The conspiracy and the murder taken together and constituting one offense.

Now, applying the second question to each of these offenses in their order, we find a separate response to each.

A. The conspiracy alone is clearly punishable under the provisions of Section 5508, the validity of which has been twice declared by this Court to be "no longer open to question."

B. The murder alone is clearly not punishable by the Federal Government as *Malum in se.* If punishable at all, it is because Sec. 5509 has made it so, and we are then confronted with the question, what power has Congress to enact such prohibition?

C. The murder as an element of the conspiracy and therefore punishable in connection therewith *and as a part thereof,* may or may not be cognizable by the Federal Court according to the validity and proper construction of 5509 taken together with 5508.

Now, these Sections read as follows:

"Sec. 5508, Rev. Stats.: If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same; * * * they shall be fined not more than $5,000, and imprisoned not more than ten years, and shall be thereafter ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States."

"Sec. 5509 Rev. Stats.: If in the act of violating any of the provisions of either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed."

Now in considering Section 5509 we must construe it either,

1st. As defining a new and separate offense, or

2nd. As merely defining a new and additional punishment for a violation of Secs. 5507 or 5508 under certain circumstances.

Now, as to the creation of a new and separate offense:

In Crookshank's case 92 U. S. 542, the Court used language which is quoted and paraphrased as follows:

"No right can be acquired under the Constitution or laws of the United States, except such as the Government of the United States has the authority to grant or secure."

No act can be punished under the authority of or by the United States, except such acts as the United States has the authority to prohibit.

Congress has no power to prohibit the crime of murder in Virginia. It is only when a particular murder operates to violate the sovereignty of the Unit . States that Congress can punish it.

While Congress may clearly punish any and all acts which operate to effect a violation of its proper laws, yet, it has no power to punish acts which merely transpire coincident with a violation of such proper laws.

It can not be said that because "A." sets out with a purpose to violate some proper Federal Law, that from that moment, and until he has accomplished or abandoned his purpose, the Federal Government has

assumed at once a watch and ward over his every act, and a guardianship over every element of the State's Sovereignty which his conduct may invade.

That each man whom he encounters—each beast of the field along his path—each boundary of land upon which his foot may fall, is suddenly clothed with a new protection which but for a distant purpose in his mind, was before unknown and unknowable to the Federal Government.

Congress can punish only such acts as violate the Federal Sovereignty, not every act of one who has a violation of that sovereignty in mind.

Now the Sec. 5509 reads:

"If in the act of violating the provisions of either of the two preceding sections," that is *inter alia*.

If in the act of conspiring together, or
If in the act of going in disguise upon a public highway, or
If in the act of going in disguise upon the premises of another,

With intent to injure, threaten, oppress or intimidate any citizen in the exercise of a "Federal right."

"Any other felony or misdemeanor be committed, the offender shall be punished for the same, etc."

Now, Congress has undertaken to punish every felony or misdemeanor which may be committed while the offender with the intent aforesaid is

Conspiring with another, or
Prosecuting such conspiracy, or
Is in disguise on a highway, or
Is in disguise on the premises of another; without any regard whatever to the relation between such felony or misdemeanor, and the intent to oppress, etc., a citizen of the United States. For the Statute reads "If *in the act* of violating any of the provisions of either of the two preceding sections, etc." This necessarily implies a physical, and not a causal relation.

By this Statute his every act is conclusively chargeable to an intent which in fact may be wholly foreign thereto. We may conceive of a case where an act might be wholly repugnant to and subversive of that intent, yet come within the punishment prescribed by Congress. One of two conspirators in disguise may be hurrying along a highway to the appointed rendezvous, with no thought in his mind but to meet and carry out a plan to injure and oppress a citizen in the exercise of a Federal Right, yet he may meet an ancient enemy, a rival in a love affair, and delay his haste for a revenge which has driven his first purpose from his mind, yet he is between his starting and his objective point; is in the act of going in disguise upon a highway; with the intent prohibited, and the assault which delays him, may be punished under this Statute.

But it may be said that Congress had no such acts in view. Answer, we can only read what Congress says, or in the language of Mr. Justice Field in United States v. Fox 95 U. S. at page 697.

"It is quite possible that the framers of the Statute intended it to apply only to acts committed in contemplation of Bankruptcy, *but it does not say so*, and we can not supply qualifications which the Legislature has failed to express."

This may be paraphrased:

It is quite possible that the framers of Sec. 5509 intended it to apply only to other felonies or misdemeanors committed pursuant to and in furtherance of the purpose of the acts or agreement violating Sec. 5507 and 5508, but it does not say so, and we can not apply qualifications which Congress has failed to express.

But it may be argued that when Congress says "If in the act of violating" it meant, "If with the intent of violating any of the provisions of either of the two preceding sections, any other felony, etc., is committed." We reply that we can not so far strain the language of a Statute as to construe the word "act" to

mean "purpose." The act and the purpose are too clearly different to permit such an interchange of meaning.

Therefore, Congress has clearly undertaken to prohibit acts beyond its power to prohibit, and we have no warrant for assuming that it intended something else wholly at variance with what its language imports, merely because that something else falls within its power to prohibit.

Then as to the contention that Congress intended to create no new offense, but merely to define a punishment for the various overt acts which might be committed pursuant to a conspiracy. We answer that 5509 applies alike to 5507 and 5508, that not all of the provisions of 5507 and 5508 are predicated upon a conspiracy, and hence not all acts punishable under 5509 can be overt acts. In fact Sec. 5507 prohibits acts of single individuals. Sec 5509 is not susceptible of such separation. It must stand or fall as it is written. This Court can not accord to Congress an intent which can only find expression by a separation of an inseparable phrase. Such an operation is as fatal an appendectemy as the separation of the Siamese twins.

Nor can it be said that 5509 merely provides a measure of punishment to be imposed where 5507 and 5508 are violated in a certain way. This is clear from the language of the Statute.

If any other felony be committed
The offender
Shall be punished for the same--
Now what is the predicate?

Some OTHER felony or misdemeanor. Under what law. By inference the State Law, but is this inference justified in seeking the operative effect of a criminal Statute.

Who shall be punished.

The offender, not the conspirators as such, (for the word offender is employed in the singular), but the individual who commits the felony or misdemeanor—

What shall he be punished for?

The same.

Not for violating 5507 and 5508, the punishment is otherwise provided, but he shall be punished for such felony or misdemeanor. This was the view of the learned trial Judge, for in his instruction to the jury he employed the following language:

"Therefore the second section (5509) means that if a felony or misdemeanor be committed by persons who have conspired with the intent stated in the first section (5508) in pursuance of or in carrying into effect the purpose of such conspiracy, the punishment *for the offense under the State law* shall be in this case governed by the law of Virginia."

"The punishment *for the offense under the State Law,*" not a part of the punishment for the conspiracy.

Not only has Congress provided the punishment for violations of 5507 and 5508, but it has enacted that the punishment shall in no case exceed a fine of $5,000.00 and imprisonment for ten years. Congress must have known that there are few felonies under State Laws, but what are punishable with longer terms of imprisonment than ten years, especially felonies such as would probably be committed in the premises. Then had Congress intended to provide a punishment for violations of 5507 and 5508 greater than ten years imprisonment, which punishment is in these sections specifically prohibited, it certainly would have framed 5509 as an exception to these specifically enacted limitations, and would not have enacted two flagrantly inconsistent Sections.

It can scarcely be contended that Congress in enacting Sec. 5509 intended the punishment therein prescribed to be applicable only as an increased punishment for such acts as would properly fall within the definition of "overt acts" pursuant to the conspiracy prohibited by Section 5508. The Statute would have to be entirely re-written by substituting the expressions

on the right for the expressions on the left in the following:

If in the act of violating any provions of Secs. 5507 or 5508.	If in the act of violating that provision of Sec. 5508 prohibiting a conspiracy
Any other felony or misdemeanor	Any other felony or misdemeanor which tends to effectuate the object and purpose of said conspiracy
Be committed	Be committed
The offender	The offender as well as each of his co-conspirators
Shall	Shall in addition to the punishment prescribed in Sec. 5508
Be punished	Be punished
For the same.	For said conspiracy.

with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed."

Such a re-writing operates not only to diminish the scope of the Statute from "any provision in Sections 5507 and 5508" to "one of the provisions in Sec. 5508" and also to enlarge the class of persons to be punished from "the offender" to "the offendor and each of his co-conspirators" but has the further effect of looking to a separate sentence in a preceding section in search for an antecedent for a relative pronoun.

Therefore 5509 must be construed as making it a new and separate offense against the United States to commit any felony or misdemeanor while in the act of violating any of the provisions of 5507 and 5508, and this regardless of whether such felony or misdemeanor operated in any wise to violate or invade the sovereignty of the United States, and alike regardless of whether it was committed with an intent or purpose

which Congress could, under the Constitution control or punish.

But assuming that this strained construction can be justified, and that Congress intended to add a new and further punishment for the conspiracy where a felony was committed pursuant thereto and to determine that additional punishment by the State Law, we come to the question.

Has the Government the power to punish both the intent and the act? Both the conspiracy and the "other felony?"

That the mental process or intent alone is the real punishable feature of a conspiracy is beyond dispute. The mere agreement is the body of the offense, and no overt act is necessary to make it punishable.

Now, under the Common Law, a conspiracy followed by an overt act was merged into the latter. This for reasons of humanity. Much more so must this be true under American Constitutions which forbid double jeopardy.

Even the authority of the State, which extends both to the conspiracy and to the unlawful (overt) act independently of the conspiracy, could not punish both.

The (overt) act is in law predicated upon a certain intent (that is where the intent is presumed from the act). When the act is punished, the intent is punished, for the act without the intent is not punishable. Therefore the one punishment having been imposed, which but for the wrongful intent could not have been imposed, it follows that in punishing the act, the intent has been once punished, and since a conspiracy is but a mutual agreement to give effect to an intent, it likewise follows that to punish the conspiracy as well as the act, would be to again punish the intent.

There may of course be overt acts connected with a conspiracy, and yet actuated by a motive wholly foreign to, but more malevolent than that which induced the conspiracy. Here the two should be merged upon the principle of the Common Law. But under this act

of Congress the United States can not punish the act, *unless it be the fruit of a specific intent*, which intent is the very body of the conspiracy. If the act be committed with other intent, or purpose, it is beyond the power of Congress to punish.

If committed with the same intent which induced the conspiracy, then Congress is undertaking to punish separately the two necessarily concurring component parts of one crime. The intent is one crime, the act plus the intent is the other crime. The second must necessarily include the first.

How then can Congress punish both the conspiracy, which is nothing more than the mutual intent, and again punish that intent as a necessarily component part of the other felony. Necessary before Congress can punish it at all. *The only part thereof which Congress can punish.*

It is admitted in the instructions given by the learned trial judge that the Federal Court could not try the murder, except under an indictment charging the conspiracy also. It is admittedly necessary to aver and prove the conspiracy in order to punish the murder, yet it is contended that the conspiracy may be again punished after the murder plus the conspiracy is punished.

If Congress can have the power to punish the murder, it is because that murder is done with the intent to intimidate, oppress, threaten, and injure, because of the exercise of a Federal Right, which for brevity may be termed "the conspirital intent." Without that intent it can not punish the murder. It is only the murder plus the conspirital intent which it can punish. Having punished the conspirital intent separately, it can not again punish any crime in which it is an essential element.

So we reach the conclusion

1st. That Congress had no power to enact 5509 as merely defining a new punishment for violation of 5507 and 5508 under certain circumstances.

2nd. That even though Congress had that power, such a construction of the Statute would do violence to its every phrase.

Therefore that Section 5509 is expressive of an effort on the part of Congress to create a new and distinct offense.

This being so, it must follow either:

That Congress has undertaken to prohibit acts regardless of whether they invade the Sovereignty of the Federal Government, and the Section is therefore void, or else that the Section must be construed as making a new offense of any felony or misdemeanor committed pursuant to a prohibited conspiracy, and in an effort to carry out its objects and purposes.

Now, the first would be clearly unconstitutional, therefore any indictment under 5509 must be predicated upon construing that Section as making a new offense of any misdemeanor or felony committed pursuant to a prohibited conspiracy and in an effort to carry out and effectuate the purpose with which that conspiracy was formed.

We respectfully and earnestly submit that to construe the section in this way is to insert therein a qualification which Congress has failed to express. That under the authority of Fox v. United States supra, the Courts are without power to supply such an omission, and that therefore Section 5509 is under any view beyond the power to Congress to enact and any indictment predicated thereon is invalid.

However, should the Court in order to uphold the validity of the Statute, give it the only construction which comes within the Constitutional power of Congress, to-wit, creating a new offense of any felony or misdemeanor committed pursuant to a conspiracy prohibited by Section 5508, then we return to the question which confronted the prosecuting officer when he drew this indictment, and find that he had concluded that paper as follows:

"And so the grand jurors aforesaid, on their oaths

aforesaid, do say that the said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors unknown, did commit the crime of conspiracy in manner and form aforesaid, and for the objects aforesaid, and that while in the act of so combining, conspiring, confederating, and agreeing together and among themselves as aforesaid, and for the purpose aforesaid, they, the said Wm. E. Rakes, Grover Beamer, Peach Rakes, George Booth, George Martin, and divers other persons to the grand jurors unknown, did unlawfully, feloniously, and wilfully, and of their malice aforethought, commit the crime of wilful, deliberate, and premeditated murder, which is a felony under the laws of the State of Virginia, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States."

Now, this must be either one of three things: Either an effort

1st. To punish the conspiracy with a double penalty, to-wit, that prescribed by the United States for a conspiracy, and that prescribed by the State for murder, which we have seen is not justified under the Statute, or else

2nd. To punish the conspiracy as one offense and the murder as another offense, yet the conspiracy being confessedly a necessary part of the murder before it is punishable by Congress. This is likewise a double punishment. And further the indictment is bad for charging the two crimes in one count, or else,

In the United States vs. Cadwallader, 59 Fed. p. 679, the Court says: "It has been considered greatly prejudicial to the defense of a prisoner to be put upon trial at the same for two distinct crimes, of a high grade, such as murder, manslaughter, rape, arson, burglary, grand larceny, or embezzlement, which would prejudice the prisoner in his defense, and lead to much confusion, if not injustice." Such has been the general rule of criminal pleadings by the Common Law,

however, in England, and presumably in most of the States have relaxed the rule by allowing in misdemeanors and purely statutory offenses two or more distinct offenses to be united in the same indictment, and putting the defendant on trial for all at once. I do not know of any case, however, where the prosecution has been allowed to unite two or more distinct offenses in the same count of an indictment; and such a thing, if allowed, must necessarily lead to much confusion and embarrassment. How is the defendant to plead, and how are the jury to find their verdict? There is no precedent or practice for allowing a prisoner to plead guilty to one portion of a count, and not guilty to another, or for the jury to find the defendant guilty under one part, and not guilty under another part."

In the case at bar the defendant might have been guilty of the murder, and yet not amenable to punishment by the Federal Government, unless he was also guilty of the conspiracy. Yet, it was impossible for him if such were the case, to raise this issue by the pleadings.

The Court instructed the jury to return a double verdict upon each of the two counts in the indictment, or upon either of them, to-wit, guilty or not guilty of the murder, and guilty or not guilty of the conspiracy. In the language of the case cited above, there is no precedent or practice to justify this course.

To the same effect is the United States vs. Kelsey 42 Fed. p. 889, where the Court says: "The indictment purports to charge two distinct offenses which should be set out in separate counts. And it therefore may be obnoxious to the objection of duplicity, which is defined to be 'the joinder of two or more distinct offenses of one count. The criminal law never permits this.' First Bishops Criminal Procedure, Sec. 432."

3rd. To punish the murder alone the conspiracy being charged merely to give the Federal Court jurisdiction of the murder. Under this view, the indict-

both in England, and in this Country. The Statutes, ment is defective, for it concludes with the charge "that the conspirators did commit the crime of conspiracy" and did feloniously commit the crime of murder."

The first was not the view taken by the Government and the Court, for the Court instructed the jury to fix the punishment for the murder, which was by the jury fixed at fifteen years imprisonment, whereupon the Court fixed the punishment for the conspiracy at one day imprisonment and a fine of $100.00. The judgment of the Court being one single judgment as for one offense.

So it is respectfully submitted that the demurrer should have been sustained, since under a proper construction of the Statute if it is at all valid, but one crime was punishable and the indictment has charged two crimes which required two seperate findings of the jury as a response thereto.

The indictment was further defective in that the crime sought to be punished should have been charged as committed with the same purpose with which the conspiracy was charged to have been formed. This was not done.

Now before the Federal Court can acquire jurisdiction of the murder, it must have been done pursuant to the conspiracy, and with the intent prohibited. Not only must the murder have been done with this intent, but the indictment must so charge. Now let us see whether this has been done—

The conspiracy is charged to have been formed with intent to injure, oppress, threaten, and intimidate one Peter Hall BECAUSE HE WAS AN INFORMER.	The murder is charged to have been committed with intent to threaten, BEAT, injure, intimidate, and KILL Peter Hall without assigning any motive whatever.

It is nowhere charged that the intent to beat and kill Peter Hall was because he was an informer. The

indictment is absolutely silent as to what induced this intent to *beat* and *kill*. It might have been because of other grudges or ill feeling. Certainly the indictment does not say it was not so—does not aver the jurisdictional requisite of any act done with intent to *beat* and *kill* Peter Hall.

A conspiracy is defined by this Court in numerous decisions to be either an agreement to do an unlawful act, or an agreement to do an act in itself lawful, but in an unlawful manner. Pettibone v. U. S. 148 U. S. 205.

Now, Section 5508 adopts into the Federal Criminal Law a certain conspiracy which but for this Statute would not be punishable by the United States. Three things must therefore concur, to-wit:

The agreement—

The agreement to threaten, injure—

The agreement to injure, etc., because of the exercise of some Federal Right.

Now, it is nowhere prohibited by Congress that one single individual shall threaten, injure, oppress, or intimidate such citizen because of his exercising or having exercised his Federal Right. It is only prohibited that two or more shall conspire to do so.

Therefore the act agreed upon must have been *agreed* to be accomplished by the exercise of unlawful means.

The indictment does not allege any unlawful means AGREED to be employed. Admitting for this argument that it charges that unlawful means were employed—it nowhere charges that such unlawful means were AGREED upon. The defect in charging the conspiracy is not cured by the charge of overt acts. United States v. Britton 108 U. S. 199–205.

"If the indictment does not set forth the object specifically, and show that such object is a legal crime, it should state the particular means TO BE used by the conspirators and show these means are criminal."

People v. Mather (N. Y.) 21 Am. Dec. 150, Lamberts Case 9 Con. 578.

Therefore when the indictment concluded as hereinbefore set out with a general charge of conspiracy and murder and against the peace and dignity of the United States, and nowhere having properly charged the jurisdictional elements, this was merely charging a conclusion of law which is bad under any system of pleading cognizable by the Federal Courts.

THIRD.

THE ADMISSION AND EXCLUSION OF EVIDENCE.

Assignment of Error 12, Record 188. The contention of the Government was that the several defendants had conspired together to intimidate Peter Hall, because he had informed the United States that Beamer and the Rakes had violated the Internal Revenue Law. This was the motive charged, and it was necessary to prove this particular motive before the Government could punish the offense. It had been shown that the plaintiff in error had been arrested for illicit distilling, and acquitted thereof, and there was evidence of no other connection on his part with any illicit distillery, except such as tended to support this charge. The evidence not having shown sufficient cause to hold him upon that charge, the Government sought to establish the ill will against Hall, because he was an informer, by showing that there were numerous distilleries upon the land of C. P. Nolen, a brother-in-law of Rakes. Therefore Peter Hall was permitted to state "I don't think there is a branch on his (C. P. Nolen's) land any where that a distillery could be put up, but that there has been one." This was irrelevant to the issue. It was not shown that Rakes had participated in the operations of these distilleries, was in the neighborhood when they were operated, or even knew of their exist-

ence, nor that Nolen had knowledge of their existence on his own land, yet its effect was to lead the jury to believe that being a brother-in-law of Nolen, and there being at various times, distilleries upon Nolen's land, therefore Rakes was an ancient enemy of all informers.

There was no charge that Bill Turner or his son Charlie Turner was connected with or in any wise involved in this offense, nor was there any evidence tending to show this. The only evidence tending to connect either with the offense, was the statement of Elizabeth Hall that Charlie Turner was with the party that came to her house about six hours before the murder. Yet (Assignment No. 13, Record 188, Bill of Exceptions No. 3, Record 170-1) Alexander Rakes was permitted to state that he had a conversation with Bill Turner, in the city of Lynchburg during this trial, and that said Turner had said, "I had better be careful, that if one side did not get me, the other would."

The object of this was to induce the jury to infer that friends of the defendant were trying to intimidate Government's witness. Such, if it had occurred, should in no wise prejudice the defendant. Otherwise an innocent man might be the victim of overzealousness on the part of impulsive friends.

The same witness was permitted to state, (Bill of Exceptions No. 3, Record 171) that he had a conversation with defendant Rakes, in which Rakes is claimed to have said that Peter Hall had reported his still and damaged him forty dollars. The defendant had asked that the time and place be designated. This was important for two purposes:

First. In order to obtain information upon which to contradict the witness, and

Second. To show whether the conversation was had before or after Peter Hall had informed against Will Rakes. If before such information was given, it went directly to the relevancy of the evidence as well as to its weight. But the Court refused to require the

witness to specify the time and place, which was prejudicial error.

It had been shown that Beamer, one of the co-defendants, was the owner of a "Buckeye Gun," and that there were a large number of such guns owned in the vicinity of the murder. That the gun owned by the defendant Rakes was entirely different being what is known as a pump or repeating gun. Yet, the Government exhibited to the jury a Buckeye Gun, and evidence was offered that this was the same kind of a gun as that owned by Beamer. It was not attempted to show that the gun exhibited was the gun owned by Beamer, nor did the Government attempt to explain the source from which the gun came into the possession of the Government. So far as the evidence shows or suggests, the gun might have been purchased at a hardware store in Lynchburg for the purpose of exhibition.

The witness was asked (Record 132) as follows:

Q. I forgot to ask you about Grover Beamer's gun. What kind of a gun did he own last Spring, at the time of this killing?

A. He owned a Sixteen.

Q. What make was it?

A. It was a Buckeye.

Q. You remember the gun that you testified to here on the other trial, don't you?

A. Yes.

Q. Did you identify that gun as his?

A. It looked like one I had seen him with.

Defendant objected as the gun had not been identified, objection was overruled.

Q. I now show you the Sixteen guage Buckeye Gun that you have heretofore referred to in your evidence, and say whether or not that appears to be the gun that belonged to Grover Beamer?

A. It looks like the gun I seen him with.

The Government then offered the gun as an exhibit, and it was admitted over objection.

The Government had not sought to show how it obtained possession of the gun, but only that it was the same brand of gun that Beamer had owned.

There is serious objection to the admission of weapons in evidence upon a charge of homicide. Stated in Wigmore on Evidence, Vol. 2, Sec. 1157, p. 1354, as follows: "The objection thus indicated seems to be two-fold. First, there is a natural tendency to infer from the mere production of any material object, and without further evidence, the truth of all that is predicated of it. Secondly, the sight of deadly weapons, or of cruel injuries, tends to overwhelm reason and to associate the accused with the atrocity without sufficient evidence. The objection in its first phase may be at least partly overcome by requiring the object to be *properly authenticated*, before or after production; and this requirement is *constantly enforced* by the Courts."

And in Sec. 2130, Vol. 3, p. 2889, says: "The necessity of authentication, therefore, applies equally well to a knife, a horse, a coat, or a machine, as to a letter or other writing whenever it is asserted to be connected with a person."

The illustration is a forceful one as applied to the circumstances of this case. Had Beamer, instead of Rakes, been upon trial, it would have been as necessary to identify the gun as his gun, as it would have been to identify a letter as written by him. Nor would it have sufficed to show that there was a similarity, for such evidence is as consistent with a want of identity as it is with identity, being purely negative in character. But upon the trial of Rakes even a letter properly identified as written by Beamer, would not have been evidence, unless shown to have been an utterance during the life of the conspiracy.

No attempt was made to show similarity between this gun, and one owned by Beamer after the formation of the alleged conspiracy. Only that he owned a similar gun in the Spring. It is not even claimed that

Beamer had a gun on the night of the alleged murder. Sam Hall says he did not see Beamer have any gun at Elizabeth Hall's. Jane Hall says (Record p. 113) emphatically that he did not have a gun. So the Government was permitted to prejudice defendant Rakes by exhibiting a gun merely of the same make as Beamer had some time in the Spring prior to the killing.

16th Assignment of Error.

The defendant Rakes offered to introduce his wife to prove his whereabouts on the night of the alleged murder. This was denied him.

Whatever the rules of evidence in the Federal Court as to the competency of such a witness, the defendant was on trial for a murder under the laws of Virginia, and under any view of the case, he was being tried as to whether he should be punished as the laws of Virginia would punish him, and in Virginia a wife is a competent witness in favor of her husband.

The Court adopted the view approved in Motes case, 178 United States, p. 458, that upon such a trial the measure of punishment should be determined in the manner prescribed by the laws of Virginia, to-wit, by the jury. If defendant was to be proven guilty of a crime under the laws of Virginia; if it was incumbent on the Government to establish that he had committed a felony under the laws of Virginia, and that the measure of punishment should be ascertained as under the laws of Virginia, it would seem clear that the defendant should have the benefit of the laws of Virginia in making his defense.

The issue was whether he had committed a felony under the laws of Virginia, and how that felony should be punished under the laws of Virginia. Surely the laws of Virginia as to what constituted a felony would control. Surely the laws of Virginia as to what evidence was sufficient to establish a felony in the Virginia Courts would control, and likewise it would seem equally clear that the defendant should be accorded

the same measure and privilege of defense as he would be accorded under the laws of Virginia.

17th Assignment of Error.

As it has been repeatedly said, the controling issue in this case (if we admit that the murder was committed pursuant to a conspiracy, to which the defendant Rakes was a party) was whether the said conspiracy was formed with the "Federal Motive." That is whether or not the conspirators were actuated by the fact that Peter Hall was an informer. If there was a reasonable doubt as to whether the conspirators were actuated by this or some other motive, the defendant was entitled to an acquittal.

He offered to show by J. J. Brammer and other witnesses (Bill of Exceptions No. 5, Record 172) that Peter Hall was a notorious and offensive character in the community, a general trespasser, a petit thief, as well as a reckless character; that the better people there were afraid to leave their homes unprotected because of him, and that he had made threats against parties other than the defendants, that he would destroy their property, and that such parties took precaution to prevent such destruction. That the witness was employed by a brother-in-law and near neighbor of the defendant to watch his barn and look out for Peter Hall who had made threats against him. But this was excluded.

The Court ruled that any threats against either of the co-defendants could be proven, but neither the general character of Peter Hall, nor threats made against the brother-in-law of defendant Rakes could be proven. The Government had repeatedly drawn out statements concerning the brother-in-law of Rakes, notably assignment of error No. 12 concerning distilleries on the land of his brother-in-law. Yet this was not considered sufficiently close a relationship to justify an attempt to prove ill feeling other than that growing out of Peter Hall's having acted as an informer. But the ruling is otherwise erroneous. If the motive which

controlled the conspirators was not the "Federal Motive," or if there was a reasonable doubt between two motives as to which controlled the conspirators, the defendant should have been acquitted.

If the conduct of the defendant was reconcilable to any reasonable hypothesis consistent with any other motive than the alleged motive, he was entitled to an acquittal. Yet he was not permitted to prove that there were other people in the community who had a motive other than a Federal Motive for injuring Peter Hall, or that either of the defendants could have entertained motives which would justify their acquittal.

The Court offered to admit evidence upon conditions that tended to show that the defendants committed the murder from some other than a Federal Motive. In other words, that the evidence was admissable only as upon a plea of a confession of the murder avoided by the contention that it was not committed with a "Federal Motive." Requiring the defendant practically to admit the murder before evidence consistent with his innocence before the Federal Court could be admitted.

We submit respectfully that under the strictest rules of the Common Law this was error. We are taught Lord Erskine (24 Howells State Trial 966) that the principles of evidence "Are founded in the charities of religion in the philosophy of nature—in the truths of history—and in the experience of common life."

While it is true that the rules of evidence in the Federal Court are the rules under the Common Law as it was in 1789, yet it is believed that no Federal Court has ever refused to follow in the wake of the later and the broader thought construing those rules according to the principles recognized at that period, but applying them to modern conditions and a more liberal theory of the philosophy of the law. In other words, as they had advanced with the growing experience of common life. Therefore whatever was the

proper rule of evidence under the Common Law at that period, obtains now in the Federal Court, and in determining what that proper rule was, these Courts are not limited by the strict and narrow view which then obtained, but have been quick in their response to the development of the law.

There are few writers whose views on questions of evidence are more worthy of consideration than Mr. Wigmore.

The author says on page 200 in Secs. 139-140-141:

"The question that arises, from the point of view of the rules of evidence, is whether, in evidencing this doing by a third person as a fact of disproof, any unusual requirements should be made as to the strength of the evidence before it can be admitted. Thus, to prove A guilty of murder, evidence of his threats (i. e. a design) to commit it are always admissable (ante, §105); now, if the fact to be proved is that B committed the murder (as inconsistent with A's guilt), why should not B's threats be admitted, without further restriction, as A's are? It is true that evidence of B's threats alone would not go far towards proving B's commission; but it is not a question of absolute proof, nor even of strong probability, but only of raising a reasonable doubt as to A's commission; and for this purpose the slightest likelihood of B's commission may suffice, or at least assist. The evidence of B's threats, to be sure, may, in a given instance, be too slight to be worth considering; but it seems unsound as a general rule to hold that mere threats, or mere evidentiary facts, of any one other sort, are to be rejected if unaccompanied by additional facts pointing toward B as the doer. Nevertheless, most Courts have shown an inclination to make some such restriction, and to insist that two or more kinds of evidentiary facts pointing toward B must be offered, and that one kind alone will not be received. It is difficult to see the object of this restriction, because if the evidence is really of no

appreciable value, no harm is done in admitting it; while if it is in truth calculated to cause the jury to doubt, the Court should not attempt to decide for the jury that this doubt is purely speculative and fantastic, but should afford the accused every opportunity to create that doubt. A contrary rule is cruel to a really innocent accused."

"SAME: THREATS BY A THIRD PERSON. Threats are perhaps the commonest kind of evidence offered for this purpose. The rulings differ widely in their effect; but in general a wholly unnecessary strictness is shown, and the illiberal attitude of some Courts in this respect toward accused persons is in singular contrast with the maudlin tenderness otherwise often exhibited."

"SAME: MOTIVE OF A THIRD PERSON. A motive as evidence is perhaps not of such value as a threat; yet Courts seem more inclined to receive it. There is no reason for requiring that it be coupled with other evidence in order to be admissible."

FOURTH.

THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT A VERDICT.

There are three essential elements of the crime charged, each of which must have been proven beyond a reasonable doubt; these are:

1st. That the defendant either committed the murder or was a principal thereto in the first degree,

2nd. That there was a conspiracy with which the murder was so intimately connected as to charge all of the conspirators therewith, and

3rd. That the controlling reason for the formation and execution of the conspiracy was that Peter Hall was an informer.

We might admit that the defendant actually committed the murder, or that he was a principal thereto in the first degree, without justifying a verdict of guilty in

this case. We might go further and admit that he was a conspirator, and that the murder was committed pursuant to the conspiracy, and still this would not justify a verdict of guilty.

If we take issue upon the reasons which actuated the conspiracy, and can show that the evidence upon this point was insufficient, we have established as a matter of law that the verdict and the judgment thereon are improper. Much might be said as to the sufficiency and reliability of the evidence that the defendant participated in the assault. More might be said as to whether there is any evidence that the assault was committed pursuant to a conspiracy, but it is sufficient for the purpose of this assignment of error if we can establish that as a matter of law there is not sufficient evidence of a conspiracy formed pursuant to the "Federal Motive."

We do not ask this Court to weigh the facts and say whether or not it would find a similar verdict upon such facts. This we understand to be beyond the assignment of error, but we do ask this Court to say that the facts are wholly insufficient to justify a verdict and that the trial Court erred in not sustaining the motion of the defendant at the conclusion of the Government's case to direct a verdict of not guilty, which motion was renewed at the conclusion of the entire evidence.

If we examine the record from a point of view of a demurrant to the evidence, we find the following facts to be established:

That Peter Hall was first an informer in December, 1906, (Record p. 59). That prior thereto he had been repeatedly arrested upon warrants sworn out by the defendant and his relatives for numerous petty annoyances and upon like warrants sworn out by many other citizens of the community, (Record pp. 59-60). That he had given information that the defendant Rakes was operating an illegal distillery, but that said Rakes had never been arrested upon the charge, nor

any warrant sworn out against him when the murder was committed, and when the warrant was subsequently sworn out, he was discharged because there was not sufficient evidence. (Record p. 71). That Peter Hall had given information against the defendant Beamer but that no warrant was ever sworn out thereon, and no action was ever taken. That no threats were ever made by either of the defendants against Peter Hall, except that J. W. Staples says on page 89 of the record, that the defendant Rakes said to him two weeks before the murder, speaking of Peter Hall, "You all let him report his own distilleries, it seems like; God damn him, he ought to be killed," which was the day after the Grover Beamer distillery had been seized.

There were five parties charged as participating in the conspiracy, four of these are proven to have been together for several hours the day of the killing, but their conduct at such gathering where other parties were present, in no wise suggested that it was the conduct of conspirators. (Record pp. 92-93).

Of these four only two are seen about eight o'clock at night searching for Peter Hall. These two were Will and Peach Rakes, and they were accompanied by Beamer and Turner, neither of whom were with them at any time earlier during the day, so that the personal composing the first searching party is made up of two of those who were in conference in the morning, and two who had not been with them before. Of these four only Will Rakes and Beamer have ever been connected with illicit distilling. When the party is next seen at the scene of murder it is composed of Will and Peach Rakes, Beamer, and Booth and Martin. Turner has disappeared and Booth and Martin, who were in conference with the others during the morning, and concerning whom the Government has not attempted to show any connection with illicit distilling, have taken Turner's place. So the party together in the morning is composed of one illicit distiller and three who are

innocent of that occupation. When next seen it is composed of two illicit distillers and two who are innocent of that occupation, and when next seen one of the innocents has disappeared, and two other innocents have taken his place.

It is consistent with the evidence that the defendant Rakes was indignant at Peter Hall because he was an informer, and was likewise indignant at him because he was a common nuisance in the neighborhood; that his three associates in the morning had no personal grudge against him because he was an informer, but might reasonably have had because he was a common nuisance. It is earnestly submitted that whatever course of conduct was determined upon in the morning is as reasonably attributable to the conduct of Peter Hall as a common nuisance as it was to his conduct as an informer.

Assuming then that the evidence points with equal probability to the two different motives which actuated any plan which might have been then agreed upon, although there is no evidence or suggestion that any plan was then formed, we next find the party composed of two who might have had ill will against Peter Hall because he was an informer, and two who had no reason to have such ill will, and it seems clear that their conduct when they are seen for the second time that day, to-wit, at eight o'clock that night, is inconsistent with that of conspirators with a "Federal Motive," and is wholly consistent with that of citizens who were ill disposed to Peter Hall because he was a common nuisance. We say this because it is shown (Record p. 100) that Sam Hall had co-operated with and assisted Peter Hall in searching for illicit distilleries, which fact was known to at least one of the four parties together at eight o'clock, (Record p. 105). Yet Sam Hall is seen while they are in search for Peter Hall, and no violence whatever is offered to him, and he is left unmolested. It would seem if (in the language of the District Court) the parties were at eight

o'clock actuated "mainly and chiefly because Peter Hall was an informer," and knowing that Sam Hall was likewise an informer, they would not have permitted one of these informers to remain unmolested, and go in search of the other.

When seen at the scene of murder only two of them can have the Federal Motive, and yet all five of them might have a different motive, and it became the duty of the jury to attribute to the defendant any motive which from the evidence might be reasonably consistent with the absence of the "Federal Motive."

If the Court can say from the whole evidence that the one motive is as consistent with the evidence as the other, then the jury have plainly disregarded the instructions of the Court, and the verdict is erroneous and unjustified.

We have carefully read and re-read the record for the search of any fact suggesting that the "Federal Motive" was even more probably in the minds of W. E. Rakes and Beamer, but have found nothing, except what is pointed out heretofore.

There is not the slightest suggestion that Booth or Martin ever entertained the Federal Motive, and Peach Rakes is connected with such motive only by suggestion (Record p. 105). Can it be said that the jury *could* have found that the "Federal Motive" was shown beyond a reasonable doubt, and to the exclusion of every other actuating motive, when three of the participants are unconnected with that motive, when two of them are no more strongly connected therewith than with some other motive, and when the conduct of those two, five hours previous emphatically negatived the "Federal Motive" in that the other informer remained unmolested.

It is not the motive for the killing which gives jurisdiction to the Federal Court, nor is it the motive which induced any one of the defendants to join the conspiracy, but it is the motive *of the conspiracy*, a motive which induced the conspiracy. The CON-

SPIRACY must have been formed BECAUSE of the exercise of the Federal Right. If the conspiracy was formed BECAUSE of some OTHER MOTIVE, there was no violation of 5508, and no jurisdiction in the Federal Court.

It is by no means difficult to see that a jury to whom had been exhibited evidence of what seemed an atrocious murder of an aged woman by five armed men, should have lost sight of the remote question of the motive which actuated the conspiracy, and have looked only to the motive which actuated the defendant, or to the moral turpitude of the defendant. If all of the other proceedings in this trial were without error, if it is proper for the Federal Government to undertake to punish this crime and to couple it with a conspiracy in one indictment, and thus assume jurisdiction thereof, this Court will not be slow to see and to view with the most serious consideration the dangers which attach to arraigning the defendant upon the charge of an atrocious crime, and submitting to a jury the question of his guilt or innocence, the correctness of which hangs upon the slight thread of a conspiracy, and where they are almost sure to be led astray by a failure to understand the narrow limits of their authority. The guilt or innocence of the defendant upon the charge of murder and the righteousness of some punishment to be visited upon them is not here involved. This, as was said by the Judge of the trial Court, does not bar the State in its prosecution for the murder, and it is a great deal more than a probability that the jury having lost sight of the slender thread of the conspiracy in contemplating the horrors of murder, have undertaken to impose upon this defendant a punishment which is reserved for another jurisdiction, and which after an acquittal in this Court or a satisfaction of its judgment, might yet be visited upon him by the State authorities.

For the purposes of the foregoing we have admitted the murder and the conspiracy. We will say noth-

ing, although much might be said, upon the evidence as to the murder. We have admitted the conspiracy likewise for the purpose of this argument, but we suggest to the Court that the evidence as to a conspiracy is as slight and as slender as is the evidence of the "Federal Motive," actuating the conspiracy.

The department of justice which through its able counsel will answer this brief, are requested to point out to the Court anything omitted herefrom and found in the record, which tends to fasten upon the defendant the conspiracy or the Federal Motive. In the absence of such a showing, and the Court upon its own investigation, failing to find further evidence, it is most respectfully and most earnestly submitted that as a question of law the record does and must disclose that the jury have failed in their duty to attribute to the act of murder, if murder it was, a motive consistent with the innocence of the defendants *coad* this prosecution, which is more easily reconciled to the evidence than one consistent with his guilt.

As to the grade of the offense ascertained by the verdict, we will only say that the evidence shows that the shots were fired at random, six out of seven of them having been fired into the door and into the side of the house, and the eighth through and shattering the glass panes of a window and all of them of the smallest bird shot, wholly failing to suggest any feloneous intent upon the part of the defendants, if all of the motives predicated upon the conduct were admitted to be proven.

FIFTH.

THE INSTRUCTION.

We have attempted to show that there may be three views as to the meaning of Section 5509.

First. To punish the conspiracy with a double penalty, to-wit, that prescribed by the United States for a conspiracy, and that prescribed by the State for a murder.

Second. To punish the conspiracy as one offense and the murder as another offense, and

Third. To punish the murder alone, the conspiracy being charged merely to give the Federal Court jurisdiction of the murder.

We have likewise endeavored to show that if the first view of the Statute prevails, it is clearly unconstitutional as imposing a double penalty, and therefore if the instructions given by the Court are predicated upon this view of the Statute, they are necessarily erroneous. We will for convenience hereafter term this the "double punishment" view.

If the second view, which for convenience, we will designate the "double crime" view of the Statute prevails, instructions predicated thereon are likewise invalid, for they put the prisoner on trial in one count in one indictment for two separate and distinct offenses.

If the third view of the Statute is correct, and it is held to be valid under the rulings of the United States v Fox *Supra* the instruction should be predicated upon the theory of a single offense, otherwise the instructions are erroneous. For convenience we will designate this view of the Statute as the "single crime" view.

We will therefore undertake to present to the Court the several instructions given to the jury as well as the instructions refused, and to point out upon which view of the Statute they are predicated.

On page 179, Clause 1, the Court instructs the Jury as follows:

"Therefore the second section (5509) means that if a felony or misdemeanor be committed by persons who have conspired with the intent stated in the first section in pursuance of or in carrying into effect the purpose of such conspiracy, the punishment *for the offense under the State Law shall be in this case* governed by the law of Virginia."

This is clearly predicated upon either the double punishment or the double crime view of the Statute,

and was therefore improper. It either means that the punishment therein referred to was for one of the two crimes charged, or for one of two parts of the same crime. It is clearly inconsistent with the "single crime" view.

Clause four of the instructions given (Record 179) is a charge in general terms to the effect that the jury should judge from the character, appearance and intelligence of the witness, their worth of credit, and refused instruction No. 16, asked for by the defendant.

"That where it has been clearly proven to the satisfaction of the jury that a witness is not to be believed on oath, no statement of such witness, standing alone, and of itself is sufficient to prove any material facts beyond a reasonable doubt."

The only evidence showing the presence of either of the defendants at the scence of the murder, was the testimony of Jane Hall. It was shown by the evidence of eight witnesses, citizens of high character, among them a minister of the Gospel, and two officials of the County of Patrick, and four of whom had been called by the Gevornment as its witnesses, that Jane Hall was not to be believed upon oath. The defendant had the right to contend that this evidence was clear and to the satisfaction of the jury, and it would seem beyond dispute that the uncorroborated evidence of such a witness as successfully inpeached, is not sufficient to satisfy the mind beyond a reasonable doubt. Yet the defendant was deprived of the privilege of an instruction to the jury upon this point. The witness, Peter Hall, who was the sole witness testifying to other facts in the case, was as successfully impeached by the same witnesses and the instruction was applicable to him.

The defendant had asked for instruction No. 3, which was as follows: "The Court instructs the jury that the law presumes the defendant to be innocent; that such presumption follows through the whole course of the trial; that the evidence must show the guilt of

the defendant to the exclusion of every reasonable hypothesis of innocence consistent with the evidence. Therefore, in ascertaining the motive which actuated the alleged conspirators, you must attribute to them any motive consistent with their innocence, which can be reasonably reconciled with all the evidence. But if you find beyond reasonable doubt that the intent was that charged in the indictment, you may find the defendant guilty of conspiring with said intent, although another or other reasons for conspiring may also have actuated some or all of the persons indicted."

But the Court in lieu thereof gave its charge designated 5, (Record 180) which was as follows: "Before you can find the defendant guilty of conspiring as charged, you must believe beyond all reasonable doubt that there was a conspiracy formed by the defendant and some one or more of the other persons named in the indictment to injure, oppress, threaten, or intimidate Peter Hall because he had exercised the right of giving information of violations of the Federal internal-revenue laws.

"If you have a reasonable doubt as to the reason for the formation of the conspiracy charged in the indictment, you should acquit the defendant. However, the mere fact that some of the alleged conspirators may have been actuated by some motive not connected with 'informing' by Peter Hall, is not ground for acquittal, if you believe beyond a reasonable doubt that at least one of such other alleged conspirators and the defendant conspired to injure or intimidate said Hall, mainly and chiefly because said Hall had exercised his rights as an 'informer.'"

This ignored the theory of the defense which is undisputed law "that the evidence must show the guilt of the defendant to the exclusion of every reasonable hypothesis of innocence consistent with the evidence." This is not covered by the charge "If you have a reasonable doubt as to the reason for the formation of the conspiracy, you should acquit the defendant," when

followed by the qualification "If you believe beyond a reasonable doubt that at least one of such other alleged conspirators and the defendant conspired to injure, or intimidate said Hall, merely and chiefly because said Hall had exercised his rights as an informer." This delegated to the jury a most delicate process of differentiating between the various motives which may have actuated the defendants. It is perfectly true that the concurring presence of a lawful and an unlawful motive will not relieve a defendant from his criminal liability. If he was actuated by any unlawful motive, he is guilty. It was not for the jury to divide the motive. The law recognizes but one motive as the inducement to the act, and it was their duty to attribute to the defendants any motive reasonably consistent with their innocence.

The jury might well infer from this instruction that it was left to them to weigh the several possible motives in the balance, and to accord to the defendant that which might seem to them the main and chief motive, and such an instruction would seem to be misleading. It is earnestly contended by counsel for the defendant that there was not sufficient evidence of any "Federal Motive," and that instructions predicated thereon were improper, but this has been discussed under another heading, to-wit, the sufficiency of the evidence to support the verdict.

Section 6 of the Court's charge (Record 180) is to the effect that the defendant might be found guilty of the conspiracy and acquitted of the murder. This was in effect instructing the jury that the double crime interpretation of the Statute was correct. If the views heretofore expressed upon this point are considered as sound, the instruction was erroneous, because the only valid indictment which could be drawn under section 5509 was an indictment for murder, the conspiracy being charged for the purpose of jurisdiction. Instruction 7 is predicated upon the same view that it was for the jury to determine the guilt or innocence of

the defendant first upon the conspiracy, and second upon the murder.

Paragraph eight of the charge (Record 180) is predicated upon murder in the first degree. The evidence is that the shots were fired through a poplar door and through a window, probably with wanton recklessness, but there is not sufficient evidence to indicate a purpose to kill. The size of the shot, all of them being bird shot, negatives this intention, and it is clearly the law of Virginia that before there can be murder in the first degree "proof must be adduced to satisfy the mind that the death of the party slain was the ultimate result of a willful, deliberate and premeditated attempt shown." Jones' case v. Leigh 598, 611; McDaniel's case, 77 Va. 281; King's case Sec. Va. cases 78-84; Whitford's case, 6 Rand. 721; Hill's case Sec. Gratt. 594-595; Howell's case 26 Gratt. 995; Wright's case, 75 Va. 914, Mitchell's case 33 Gratt. 845; Wright's case, 33 Gratt. 880.

The party slain was Ann Hall. There is no evidence whatever indicating a purpose to kill Ann Hall, even though the purpose to kill Peter Hall were admitted and under the law of Virginia, this could not be murder in the first degree. It is perfectly true that under the Common Law a shot at A with an intent (expressed or implied) to kill A, but which resulted in the death of B is murder, but this in the absence of the distinction between murder in the first and murder in the second degree. In Virginia such a crime might be murder in the second degree, but not willful, deliberate and premeditated murder.

Nor can it be said that this error is not prejudicial for the reason that the jury acquitted the defendant of murder in the first degree. Courts can not profess to be ignorant of the fact that verdicts of twelve men are compromise verdicts, and it is within the range of probable certainty that where a defendant is found guilty of murder in the second degree and the punishment fixed within three years of the maximum, that some

members of the jury who were in favor of a higher, and some in favor of a lower punishment. Furthermore, to instruct the jury that they may under the evidence find a defendant guilty of a crime not shown by the evidence, is bound to prejudice the minds of the jury as to the enormity of the crime. It must clearly appear that the error was not prejudicial.

Seeking to secure a ruling from the Court upon its interpretation of the Statute, the defendant asks the Court to instruct the jury that he was upon trial for conspiracy alone, and that any offense charged committed pursuant to conspiracy was to be considered only in connection with the punishment for the conspiracy. If it is held that the Statute imposed two punishments for the conspiracy, it must be unconstitutional. If it is held that it imposed for the conspiracy one punishment composed of two parts, it was error to refuse the instruction. Therefore if this Court takes either of these two views of the Statute, the judgment must be reversed for prejudicial error.

The evidence was that all of the defendants except Grover Beamer, were in conference on the afternoon of the day of the killing, and it is the theory of the Government that the conspiracy was then formed. It is not attempted to show that more than one of these present at the time had any reason to know or believe that Peter Hall was an informer. Therefore if the conspiracy was then formed, and it was a motive common to any two of them, it must have been some other than a "Federal Motive." Later they were joined by Grover Beamer, and this inferentially after the conspiracy had been formed. It is as reasonable to suppose that Beamer's meeting with them was accidental as that it was pre-arranged,—the presumption will be that it was accidental. The motive which actuated him did not induce the conspiracy, and the defendant had a right to Instruction No. 7 (Record 175-6) to the effect that the defendant was not chargable with the motive which actuated Beamer in joining them, unless

the same was known to and acquiesced in by the plaintiff in error. This instruction was refused.

Paragraph 10 of charge (Record 181) emphasized paragraph 8, and is therefore erroneous.

Paragraph 11 (Record 181) of the Court's charge specifically directed the jury that if they found the defendant guilty of murder in the second degree, they should fix his punishment for *that offense.* This was clearly an adoption of the double crime view of the Statute, as the Court had just refused defendant's instruction 6 repudiating the double punishment or two part punishment theory.

Paragraphs 12 to 16 inclusive (Record 181-2) was as to the form of the verdict, which in effect instructs the jury to find separately the guilt or innocence of the defendant upon each of the two charges, to-wit, the conspiracy and the murder, which adopted the double crime view of the Statute.

Defendant's instruction 5 was that the jury should take into consideration all of the relations between Peter Hall and the defendants in ascertaining the motive, but the Court refused this instruction, and yet had charged the jury that they must determine the main and chief motive which actuated the attack upon Hall. They were charged to weigh between two possible motives, and yet were not instructed that they might consider facts which would bear upon the motive which was not punishable.

Instruction 9 asked for and refused was predicated upon the theory that the conspiracy was to run Peter Hall out of the country, and that the shot which killed Ann Hall, fired by one of the conspirators, departed from that purpose and without any encouragement from the accused, was not the act of the accused. This was consistent with one view of the evidence, and should have been given.

Instructions 10 and 11 were predicated upon the theory that the shot was fired with the intent to intimi-

date Peter Hall, but without intent to kill him, and that if fired pursuant to the mutual purpose, was but voluntary man-slaughter under the law of Virginia. Man-slaughter in Virginia is distinguishable from murder by the absence of malice, express or implied, the act having been intentionally done, but not intended to result in death. This was consistent with one theory of the evidence, to-wit, the reckless shooting without malice, yet the Court eliminated from the case the crime of voluntary man-slaughter, which under the laws of Virginia is punishable by imprisonment from one to five years.

Instruction 14 asked for is predicated upon the necessity that at least two of the conspirators were actuated by knowledge or belief that Peter Hall was an informer. This was refused, and the effect was that the verdict of the jury was in no wise based upon the consideration that such knowledge or belief actuated the conspiracy. It is almost inconceivable that two men should conspire to injure or kill another, because that other had done a specific act, unless they had knowledge or belief that such specific act had been committed.

The conspiracy alone gave jurisdiction to the Court, and instruction 15 was asked for to the effect that every essential element of conspiracy must be proven by clear, distinct and reliable evidence and beyond all reasonable doubt before any punishment can be imposed.

It is true the jury were instructed that a verdict of not guilty of the conspiracy would acquit the defendant, but they were no where instructed that every element of the crime of conspiracy must be proven by clear and distinct testimony. On the contrary, they could reasonably interpret the instruction to mean that the jury might find the defendant guilty of murder beyond all reasonable doubt, and if they believed that he was guilty of a conspiracy, then the verdict should so find.

SIXTH.

THE FORM OF THE VERDICT.

We have already discussed this under the heading of the demurrer to the indictment and the instructions of the Court. It is sufficient to say that the verdict has clearly and distinctly found the defendant guilty of two distinct and separate offenses under one count in one indictment, (for the two counts are practically the same) the punishment for one offense has been fixed by the jury and added to that has been a punishment ascertained by the Court for the other offense. There was but one issue joined and the verdict is not therefore responsive to the issue. If there was but one offense charged, the verdict is not responsive to the indictment. If there were two offenses charged, the indictment is bad not only for duplicity, but that it is predicated upon an invalid statute, and under any view of the statute, of the indictment, of the pleadings, or of the evidence, the verdict is improper in form and substance and is consistent only with the instructions of the Court.

SEVENTH.

THE JUDGMENT.

If all the other assignments of error were waived, it is respectfully submitted that the judgment should still be reversed because of its form. As we have undertaken heretofore to point out at great and tedious length, if the Statute undertakes to punish the crime of murder as such, it is invalid. If it is sought to attribute to it an interpretation that it undertakes to punish only such unlawful acts as are committed in an effort to effectuate the conspiracy, then this interpretation is based upon a straining of the language of the Statute and supplying a limitation upon its provision which Congress has not provided.

If it is construed as prohibiting such an offense, then it must be a separate and distinct offense, and the indictment can be upheld only upon the theory that it charges the murder pursuant to the conspiracy, and not the murder and the conspiracy.

If this view is taken the instructions of the Court were erroneous, the verdict was improper, and the judgment was void.

If it is construed to mean that it is a new and additional punishment provided for the conspiracy alone, then the instructions of the Court are improper and the verdict is bad in form, and the judgment is invalid.

If the murder alone is punished, the judgment has imposed a double punishment therefor and under the authority of ex parte Lange, 18 Wallace 163, the defendant has been deprived of its Constitutional right of a protection against double jeopardy.

If the Statute is construed as creating a new offense, then the indictment has charged two offenses and the jury has found the defendant guilty of two offenses under one issue in which the evidence against him in respect to one charge will be conclusively presumed to have prejudiced him in respect to the other charge.

Under only one view can the indictment be held sufficient.

If it is considered a valid indictment for a conspiracy alone, the murder being charged as an overt act and the conclusion of the indictment disregarded as surplusage and there are no errors in proceedings subsequent to the indictment, then the judgment can be sustained only to the extent to which the Court has imposed a punishment for the conspiracy proper, to-wit, one day's imprisonment and a fine of One Hundred Dollars.

If considered as an indictment for murder cognizable under 5509 properly limited the indictment is bad for duplicity, the instructions erroneous, the ver-

dict not responsive and the judgment imposes a double punishment.

It is respectfully submitted that judgment can under no view be sustained except as to the punishment of one day's imprisonment and the fine imposed and that unless reversed the improper part of the judgment should be arrested and the Court then affirm the proper part as above specified.

Most respectfully submitted,

WALLER R. STAPLES,
Of Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
JAN 7 1909
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908

No. 257

W. E. RAKES

PLAINTIFF IN ERROR

vs.

THE UNITED STATES

DEFENDANT IN ERROR

CONCLUDING NOTE FOR PLAINTIFF IN ERROR

UNION PRINTING AND MFG. CO., OPPOSITE POSTOFFICE, ROANOKE, VA.

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CONCLUDING NOTE FOR PLAINTIFF IN ERROR

Inasmuch as the reply brief for the Government was not filed until the hour for argument had arrived and counsel for plaintiff in error first saw the same on the morning of that day, counsel for plaintiff in error beg leave, in response to the Government's position that questions prerequisite to the jurisdiction of this court were not properly raised in the trial court, to call the attention of the court to the following extracts from the record in this case.

On page 17 is found the following:

> "Wherefore the said defendants say that the said indictment is wholly insufficient in law and is bad for duplicity as to each count thereof," etc.

And on pages 183 and 184, in his exception to the charge given by the trial court to the jury, the defendant said:

"That the said instruction authorizes the jury to find the defendant guilty of two offences under the same count in the same indictment, which is a deprivation of his constitutional right."

"That the instructions of the court, found in clauses 8, 9, 10, 11, on pages 5 and 6 of the instructions given by the court, are erroneous, for this, that it was improper and a denial of a constitutional right of the defendant to try the defendant for the crime of murder and of conspiracy under the same count in the same indictment."

"That instruction in clause 15, section (b), found on page 7 of the instructions given by the court, was erroneous and misleading, for this, that it authorized the jury to find the defendant guilty of two distinct offences, punishable by two separate and distinct punishments, under the same count in the same indictment, which in effect authorized a double punishment under one count in one indictment, which in effect deprived the defendant of his constitutional right of exemption from double jeopardy, and that the instruction contained in clause 16 is erroneous for the same reason."

It being the contention of counsel for plaintiff in error that to combine in one count two distinct offences deprives him of his right to plead an acquittal or conviction of one as a bar to the other.

The same point was raised in the exceptions appearing as bill of exceptions No. 8, on page 185 of the record.

Respectfully submitted,

WALLER R. STAPLES,
For Plaintiff in Error.